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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I.

Respondents' brief ("Opposition") fails directly to answer the essential points in our Petition for Certiorari, Supporting Brief, and Supplemental Brief. Respondents permit themselves wholly immaterial observations; and even, in one or two instances, to make statements directly contrary to the record.

II.

The gist of the story plainly is that the Passarell family, with lands adjoining those of Mrs. Olivieri Commins on the one side (R. 109) as those of the Mercado family did on another side (R. 322-323; petition for certiorari p. 4), and who had long desired them [had wanted to buy them for at least two years; Francisco Passarell Lluberas' testimony; R. 110], succeeded through their mother Doña

Elena Passarell Lluberas de Delgado, with her friendship for Mrs. Olivieri Commins [Doña Elvira], in inducing the latter to agree to sell and to lease them, so as to enable Doña Elena to make a present of them to her children. That was late in January or early in February, 1937. (R. 165-166; 381-383; petition, Appendix II, pp. 44-46). Francisco says that his mother, who now lives in New York, visited the Island for the last time in February of that year (R. 104).

The option held by the Mercado firm required notice to them of any offer to purchase or lease. Here was an offer,—and, in fact, an acceptance;—and notice should of course have been given to the firm. And all the parties plainly knew it.

Mrs. Olivieri Commins had been since the December previous,—and was actually then,—in negotiations with the Mercado firm,—initiated by herself, through her son-in-law Barletta,—seeking to get an offer, and had just recently been expressly told, on January 4, 1937 (Mercado to Barletta; R. 172-173), that "we had an option to purchase or lease on the same terms."

It was after that, that she and the Passarell family with the assistance of her son-in-law, Barletta, resorted to the trick of a simulated mortgage and the elaborate machinery by which they put Doña Elena's gift money into her son Francisco Passarell Lluberas' hands as a trustee, to hold until it could be paid over to the Tous Soto heirs as mortgagees, and the mortgage having been thus extinguished on the record, Mrs. Olivieri Commins could,—(colorably free of the option, on the face of the record),—convey and lease the properties to the Passarell family.

B. The trouble with all this elaborate machinery is its very elaborateness. Why go to all that trouble and the round-about methods, if there had been nothing to hide?

C. The rights of the parties were fixed by the offer of Doña Elena to Doña Elvira and its acceptance. All the rest was mere machinery. The option took effect, and the

rights of the Mercado partnership under it accrued and became fixed at the moment of the offer. That moment the Mercado firm became entitled to notice of that offer, so as to give it the opportunity to exercise its option, if it should see fit.

D. The elaborate simulated mortgage, and all the other accompanying transactions were really nothing; and could not affect the option rights at all. As the Supreme Court of Puerto Rico had itself said in *Colon* v. *Colon*, 51 P. R. Rep. 95,101-102, quoted in our "Supplemental Brief" (p. 3), such a simulated conveyance "was an absolute nullity."

E. As pointed out in our original petition (p. 10), both of the insular Courts,—the District Court, followed in this by the Supreme Court,—expressly found that not only Mrs. Olivieri Commins, but also all of the other respondents, the entire Passarell family,

> "were advised", "of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios'" (R. 39).

Under those circumstances they could not take shelter behind the registry provisions of the Mortgage Law, or of the Civil Code; as has been several times squarely held by the insular Supreme Court itself, as pointed out in our Petitioner's Supplemental Brief (pp. 2-4).

Respondents' brief attempts no direct reply to this.

III.

RESPONDENTS' PROPOSITIONS.

Respondents rest their case in essence upon these propositions:

1. That (*Brief*, p. 17) the conclusions of the local courts and their application of the different local statutes involved to the facts of the case, should not be interfered with by an appellate court; and that Rule 39(b) of the Circuit Court of Appeals is reasonable, and was correctly applied to this case.

2. That if petitioner felt itself aggrieved by the decisions either of the District Court or of the insular Supreme Court or of the Circuit Court of Appeals it should have asked that the various decisions be "reconsidered" by those Courts; and that, not having asked such reconsiderations, it is not entitled to have their decisions reviewed by higher courts.[2]

3. That on the face of the registry respondents have a good chain of title [created by the elaborate machinery which they set up].

4. That the actual intent of the parties in the sale of the mortgage notes to the Tous Soto heirs in 1933, is overridden by Section 152 of the Mortgage Law and Sections 1418 and 1759 of the Civil Code, which [they contend] had the effect of transferring to the heirs the entire ownership in all the rights created by the instrument of March 23, 1932, the so-called "Mortgage Deed" between Mrs. Olivieri Commins and the Mercado firm, including, and necessarily carrying to the heirs, as they contend, not only the mortgage securing the "bearer" notes, covered by the first six clauses of the instrument, but also the wholly independent contracts between the parties for the option to purchase or lease (Clause "Seventh"), and forbidding partition of the estates between the sisters without the consent of the partnership, the lessee of both estates as well as the mortgagee (Clause "Eleventh").[3]

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[2] Seemingly strange doctrine; and seemingly quite at variance with respondents' complaint (*Brief*, p. 22) that this litigation has already lasted for "seven long years". For how much longer time would respondents think it should have been dragged out, by stopping to ask reconsideration at each stage, of each court's decision?

No complaint is made of any delay in the litigation on petitioner's part, at any time. The complaint seems to be, simply, that petitioner has insisted on presenting its rights to the courts.

[3] This despite the facts that, as pointed out in our original Petition and Supporting Brief: (a) There was no instrument of assignment of the mortgage deed itself, but only of the "mortgage credits", effected by delivery of the bearer notes; (b) That even the transfer of the notes was not an outright transfer, but that on

5. That the District Court's finding, approved by the insular Supreme Court, above quoted, that prior to the sale and lease of March 9, 1937, all of the respondents "actually were advised",

> "of the right of option to purchase and lease held by Mario Mercado e Hijos,"

meant only that the respondents knew of the original execution of the "Mortgage Deed" of March 23, 1932, containing that option; and that the finding did not mean that the Court found that the respondents knew that the Mercado firm still held or was claiming the right to exercise that option.[4]

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the contrary the partnership retained an interest in them to the extent of retaining three-quarters one one per cent per annum of the interest accruing on them, and in consideration of that, (c) Undertook and guaranteed, absolutely, to *advance* in *monthly installments* the eight and one-quarter per cent interest sold to the heirs [so as to give the widow and the children of Tous Soto a regular guaranteed monthly income]; and (d) That, to that end, the partnership retained the right and duty under Clause "Fourth" of the so-called "Mortgage Deed" of March 23, 1932, to collect the interest semi-annually from the mortgagor Mrs. Olivieri Commins by means of retaining it out of the rent money accruing to her as the owner of the property from the partnership as lessee, and thus to reimburse itself for its monthly advances to the heirs, and to collect the three-quarters of one per cent interest remaining due to itself.

That, of course, all appeared of record on the face of the instrument assigning the "bearer" notes secured by the mortgage. It showed an active interest retained, and active duties remaining to be performed by the partnership, even under the mortgage clauses, strictly so considered, of the "mortgage deed" of March 23, 1932; and plainly negatived any intent to assign it outright to the Tous Soto heirs.

[4] Despite the uncontradicted evidence to the contrary; particularly, for example, that of Mr. Mercado (R. 173) that on January 4, 1937, he expressly reminded Mr. Barletta, Mrs. Olivieri Commins' son-in-law and agent, in replying to the latter's request for an offer on the property, *of the option which the firm held;* and the admissions of respondent Francisco Passarell Lluberas himself that Mrs. Olivieri Commins had said to him that she was not free to sell because of the option held by the Mercado firm (R. 121-122); and that he had been desirous of buying the property for some two years (R. 110).

6. That the intervention of the Mercado firm in the partition deed of the properties between the sisters on August 20, 1936, for the purpose of giving its consent to the partition, in accordance with the provisions of Clause "Eleventh" of the "Mortgage Deed" of March 23, 1932, means nothing; because, as respondents now set up (*Brief*, p. 14):

> "*Such intervention is explained by the fact that, at that time, the partnership Mario Mercado e Hijos was* the mortgage creditor of *Santia Olivieri Commins*, that the shares which the referred to Santia Olivieri Commins had in the 'Indios' and 'Juanita' properties were mortgaged to that partnership, and that in this mortgage contract Mario Mercado e Hijos had forced upon the mortgagor a clause similar to the option to purchase and sell and to lease clause contained in the mortgage entered into between Elvira Olivieri Commins and Mario Mercado e Hijos (Rec. 227-236). *As far as Santia Olivieri Commins was concerned, the intervention of the partnership* Mario Mercado e Hijos in the said deed of partition *was a legitimate one; but it was not so as far as it concerned Elvira Olivieri Commins* who owed nothing at that time to Mario Mercado e Hijos." (*Italics supplied.*)[5]

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[5] This statement in the brief appears to be in direct conflict with the very record of the deed of partition to which it refers (Exhibit "A" for plaintiff, R. 225-259); and it appears also to be an afterthought, occurring to respondents now for the first time; and to be in conflict also with their admissions in their answers in the District Court (R. 22, 27), and with that Court's findings (R. 38), noted in our original Petition (pp. 6-7; 42). The partition deed recites the two mortgages of the two sisters, the one given by Doña Santia (R. 227-232), and the other by Doña Elvira Olivieri Commins (R. 232-237), each at length,—including in the latter the provisions creating the security of the "bearer" notes including the provision ("Fourth"; R. 234, for the retention by the partnership, out of the rentals, of the $4100.00 per annum, in semi-annual portions on March 4 and June 2 of each year, to be applied to the interest accruing; and also the option clause ("Seventh"; R. 235), as well as the consent clause "Eleventh" (R. 236),—all recited at length, *and without any mention anywhere of the assignment of May, 1933, four years earlier, of the bearer notes or "Mortgage Credits" to the Tous Soto heirs,—or any mention whatever of those heirs at all, or any mention of any assignment at all of the indebt-*

7. In this connection respondents' brief also says (*Brief*, p. 18):

"The petitioner speculates on and misrepresents the intervention that partnership Mario Mercado e Hijos had in the division or partition of the 'Indios' and

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edness, or of the March 23, 1932, instrument, or of any change whatever in its ownership or in the relations with regard to it of the parties, the Mercado partnership and Mrs. Olivieri Commins; and then after the provisions for the partition of the properties between the sisters (R. 238-255) including provisions (R. 252) that:

"Twelfth:—As the estates Juanita and Los Indios have been planted to Sugar canes and lessee, Mario Mercado e Hijos, has gone on doing the same, any sugar quota that may be assigned to said estates under the Costigan-Jones Act or by the Secretary of Agriculture of the United States of America shall be divided up in equal shares for the land adjudicated to Mrs. Santia and Mrs. Elvira Olivieri Commons."

"Thirteenth:—The mortgages constituting a lien upon the respective condominiums which formerly belonged to Mrs. Santia and Mrs. Elvira Olivieri Commons in the two estates which have been involved in the dissolution of the joint ownership, will continue as a lien in every respect upon the parcels respectively adjudicated to said mortgagors."

and then there follow the closing provisions embodying (R. 255-256) the consent of the Mercado partnership, and the express acknowledgment of all of the parties of being "fully aware of the whole contents of this deed", and that "the same has been drafted pursuant to a previous agreement", reading as follows:

"Eighteenth:—It is stated by the parties herein that *the partnership Mario Mercado e Hijos appears in this deed through its attorney-in-fact, Jose R. Peralta, solely and exclusively for the purpose of the consent given by said partnership as interested in the mortgage credits above mentioned to the partition of the jointly owned properties carried out therein,* but that it does not bind itself by, nor is it responsible for, the stipulations contained in the clauses of the present deed and that, as far as said partnership is concerned, any of said clauses affecting its rights as present lessees of the estates and adjoining property owners of the estate Los Indios shall be held as non-existent."

"Nineteenth:—The parties hereto Mrs. Santia Olivieri Commins and her husband Mr. Narciso Ferrer Sardo and Mrs. Elvira Olivieri Commins and Mr. Jose R. Peralta as the attorney-in-fact of Mario Mercado e Hijos fully aware of the whole contents of this deed, accept the same in all its parts and in those parts concerning them individually because the same has been drafted pursuant to a previous agreement."

'Juanita' properties between Elvira Olivieri Commins and Santia Olivieri Commins, as per deed No. 33 of March 20, 1936 (Exhibit "A" for plaintiff, Rec. 255-256)." [*The same partition deed described in the preceding paragraph, and in the preceding footnote 5 hereof.*][6]

Respondents fail to say wherein petitioner has in any way improperly "speculated on", or has in any way "misrepresented" the Mercado partnership's intervention in that partition deed for the purpose of giving its consent as required by the provisions of Paragraph "Eleventh" of the March 23, 1932, Mortgage Deed.

It was through that very partition deed that the respondents took title, since it was the title received by Mrs. Elvira Olivieri Commins by that partition deed to the estate "Indios" which she attempted to transfer to the Passarell family respondents by the deed of March 9, 1937 (Exhibit "B", R. 260-269); and it was the title which she received by that partition deed to the estate "Juanita", that she assumed to lease to the respondent Blasini

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[6] Petitioner said, in the petition for certiorari (pp. 6-7) and in "Appendix II" thereto (p. 42),—with *absolute accuracy*, as it is submitted,—

> "And it was clearly understood between the parties that, in fact, the option was not intended to be assigned, but was reserved to the Mercado partnership, as was also the right to be consulted and to give its 'consent', upon any partition of the lands." • • • And that such was actually the understanding at the time, was shown on the public records later on, by the fact that upon the partition of the lands between Mrs. Commins and her sister three years afterwards, on August 20, 1936,—before any of the questions here involved had arisen,—*it was the Mercado partnership,*—and not the Jose Tous Soto heirs,—*who appeared with the parties in the formal partition deed for the purpose of giving its 'consent' to the partition under Paragraph 'Eleventh' of the original 1932 deed (District Court's Findings of Fact; R. 38).*"

[And the same thing, substantially, was repeated in somewhat different phraseology in our "Chronological Analysis of the Facts" Appendix II, at page 42, *supra*].

and his wife Celia Passarell Lluberas on the same date March 9, 1937 (Exhibit "T", R. 375-380). Necessarily, therefore, all of the respondents are bound to notice of everything in that partition deed.

8. Respondents further contend (*Brief*, p. 67) that Mrs. Elvira Olivieri Commins denied having received any offer from Doña Elena Passarell de Delgado, the mother of the Passarell respondents.

Mrs. Olivieri Commins' statement of that conversation with her friend, Doña Elena,—the statement she made when asked about it in the presence of the stenographer on April 6, 1937, during the notarial act of making formal demand upon her for rescission of the sale and the lease (R. 164-167),—is set out in Appendix II to our original petition for certiorari (pp. 44-56).

Her confused and halting attempted denial of it two years later, when recalled to the witness stand the second time by the respondents during the trial of this case in the District Court in November, 1939 (R. 218-222), [and when admitting, also, on cross-examination that she might have testified differently upon the former trial in the ejectment suit: "*Maybe. It is now two years since that*"],—is in Appendix I to this reply brief (*infra*, pp. 30-32).

It is noteworthy that the District Court made no finding upon her testimony, and that the respondents do not even attempt further to support it than simply to note (*Brief*, p. 67) the fact that she did enter this denial. And it is noteworthy also, that Francisco Passarell Lluberas himself testified (R. 104) that his mother, Doña Elena Passarell de Delgado, actually did visit Puerto Rico about the month of February, 1937, the time when Mrs. Olivieri Commins said in her statement before the notary on April 6, 1937, which was taken down by the stenographer, that that conversation between the two ladies had taken place.

And that it did actually take place, as she said then, and that the succeeding transactions were built upon it, or

upon some similar conversation or agreement made about that time, is plainly indicated by the sequence of events.

IV.

Further comments on respondents' propositions.

A. Our comments on most of respondents' propositions are contained in the preceding footnotes (*ante*, pp. 4-8). It may be observed further:

B. With further reference to Mrs. Olivieri Commins' confused attempted denial at the trial of the present case of her statement two years earlier concerning her conversation with her friend Doña Elena (Mrs. Passarell-Delgado), and the latter's offer to purchase the "Indios" estate for her children upon condition that Doña Elvira (Mrs. Olivieri Commins) would also lease the "Juanita" estate at the same time to her own nephew Blasini, whose wife Celia was likewise one of Doña Elena's daughters,—and as to the present reliance of the respondents on that denial and on the lack of any clear cut finding either one way or the other by either of the insular courts as to that conversation between the two ladies,—it is to be observed that Mrs. Olivieri Commins' [Doña Elvira's] denial of it is really, in a way, wholly immaterial here.

C. That is to say, it is really self-evident, without any direct testimony at all, that some such conversation must have taken place, at some time along in the early part of the winter of 1936 to 1937, in January or February, between Doña Elvira [Mrs. Olivieri Commins] and some member of the Passarell Lluberas family, either the mother Doña Elena or some one of respondents or some agent for them, and must have resulted in some offer to Doña Elvira, and her acceptance of it in some form, upon which the elaborate succeeding transactions were based, leading up to the instruments of sale and lease of March 9, 1937. The testimony of Blasini (R. 186-199), and of Francisco Lluberas Passarell (R. 104 *et seq.*) and of Mrs. Olivieri Commins

herself (R. 79 *et seq.*) concerning their doings on March 8th and 9th, together with the hide-and-seek game played by her son-in-law and agent, Barletta, with Mr. Mercado and Mr. Peralta, the Mercado firm's manager, during the whole winter (R. 127 *et seq.*; 172 *et seq.*; and Exhibits "N" to "S," R. 371-374, letters and telegrams), and Barletta's evasive statement to Peralta, when the latter ran across him in attorney Zapater's office on March 8th, the very day they were actually closing up the transaction for the cancellation of the 1932 mortgage behind Mercado's back and without any notice to that firm, when Barletta still said to Peralta that their transactions were coming along in good shape,—plainly meaning to give Peralta to understand that he was referring to the negotiations between them for a sale of the property to the Mercado firm, but equally plainly meaning in his own mind to refer to the transactions for the sale and lease to the respondents (R. 145-146; 181),—and Barletta's evasion of process to compel his attendance as a witness at the trial of this case, and apparent absence from the Island then (R. 184-186),—*all of those things are too fantastic on any other theory* than that an offer of some kind had actually been made to Mrs. Olivieri Commins and accepted by her, and that the machinery was being put into effect to endeavor to consummate that transaction behind the Mercado firm's back, and without notice to it.

D. The findings and the decision of the District Court do not go upon any question of comparative veracity of the witnesses, but solely upon a question of law; primarily on that Court's finding that as a pure matter of law the May, 1933, assignment of the mortgage notes to the Tous Soto heirs necessarily carried to the heirs all of the rights of every kind under the March 23, 1932, mortgage deed, despite the contrary actual intention of the parties, and despite the independent character of the clauses "Seventh" and "Eleventh" covering the option and the right to be consulted and to consent before any partition of the estates between the sisters, and despite the limited character of

the assignment even of the "bearer" notes themselves, and despite the record three years later of the August 20, 1936, partition deed between the sisters, recognizing that it was still the partnership, the original mortgagee, and not the Tous Soto heirs, whom all the parties were treating as still the holder of the mortgage deed, and despite the solemn declaration in Court of the Tous Soto heirs themselves by their deed of March 31, 1937 (Exhibit "E", R. 281-286), apparently executed as soon as the question was called to their attention, acknowledging that such was the actual intent of the parties, and despite the provisions of Sections 1233 to 1241 of the Civil Code that the actual intent of the parties to a contract shall govern, and despite the former decisions of the Supreme Court of Puerto Rico itself and of the Supreme Court of Spain that actual knowledge cures or supplies any lack of notice or defect in the Registry,[8] and that a party possessed of actual notice or knowledge can never take shelter behind the letter of the registry laws as an innocent "third party," and despite that court's own positive finding that all of the respondents here actually had full notice, before the execution of the March 9, 1937, deed and lease, of the Mercado firm's continuing to hold the option.

That judgment, followed and affirmed by the insular Supreme Court, was clearly and even "inescapably" wrong.

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[8] Supplemental Brief for Petitioner, pp. 2-5, and Appendix II, and see also *infra*, pp. 13-26.

V.

Respondents' personal knowledge supplied any possible lack of notice in the record of the reservation of the option to the partnership, in the May, 1933, assignment of the "Mortgage Credits" by the limited transfer of the "bearer" notes.

Supplementing what we have already said in our original Petition and Supporting Brief, and in Points VI and VII and Appendix II in Petitioner's Supplemental Brief, and replying further specifically to what is said on this point in respondents' brief.

Going back to the unlawful detainer or ejectment case, between the same parties here,—unsuccessfully brought by the Lluberas-Passarell respondents against the Mercado partnership, in June, 1937, for possession of the estate "Indios" upon the expiration of the partnership's old ten-year lease, in which the Lluberas-Passarell's were defeated both in the District Court and also on their appeal to the insular Supreme Court,—the issue in that case was: Who shall retain possession of the property while this plenary suit is pending? *Lluberas* v. *Mercado*, 55 P. R. Rep. 39. To us it is obvious that the palpable error committed by the insular Supreme Court in the present case came from that Court having departed from the principle and method of approach followed in that unlawful detainer case, where the Court found the Mercado firm had the right to immediate possession simply because the Lluberas-Passarell family had notice of the option and deliberately tried to violate it. It found as follows:

> *"We do not wish to reach any conclusions in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, supra; that they knew*

that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

The unlawful detainer action under the facts of our case, as in the case of *Wheeler* v. *Standard Oil Co.*, 263 N. Y. 34, where the *mala fide* buyer also bought with notice of the option and also filed ejectment against the lessee-optionee, turned upon the question of notice and the effect of notice. In *Wheeler* v. *Standard Oil*, however, the optionee filed a counterclaim and not an independent action, but it is obvious that both cases, the ejectment action and the action to enforce the option, rested upon the same set of facts. When such is the situation, it is clear that the facts found in one case are decisive for the other.

The doctrine of the *Wheeler* case, as shown in our original and supplemental briefs, is the same doctrine prevailing everywhere. Strange enough, it is the unanimous doctrine of the Supreme Courts of Puerto Rico, Spain, English Courts, Federal Courts, and States of the Union Courts. It is to the following effect (*Wheeler* v. *Standard Oil Co.*, N. Y. Rep. 263; pp. 36, 37-39):

"The appellant leased a portion of a village lot from Thomas Kerley as trustee and Annie T. Chew, the owners, for a term of five years. *The lease contained an option to purchase.* The lessee went into possession and erected a gas station and made other improvements on the lot. Thereafter, the respondents, as members of the Board of Education of School District No. 1, purchased the entire village lot, including the land leased to appellant. *The premises were purchased by respondents with notice of the terms of appellant's lease and of the option contained therein. The appellant complied with all the terms of the lease and duly exercised its option and in all respects complied with its terms.* The respondents refused to comply with the terms of the option and convey the premises to the appellant-lessee." * * *

"One who purchases land and accepts a deed thereof, *with full knowledge that a lessee in possession has*

> *a right under his lease to purchase the land* leased, upon complying with the terms of the lease takes the land subject to the terms of the lease and may be compelled in equity to carry out its terms by conveying the land to the lessee upon his complying with the terms of the contract. *One who purchases with notice of equities is bound thereby. Lovejoy* v. *Potter*, 60 Mich. 95; *Hodge* v. *Sloan*, 107 N. Y. 244; Story's Eq. Juris. (Vol. 1, 10th ed.) Secs. 395 and 396; Real Prop. Law, Sec. 223; Cons. Laws, ch. 50.)'' (*Italics Supplied.*)

It is obvious, we repeat, that in *Lluberas* v. *Mercado, supra,* as in the *Wheeler* case, respondents' notice of the existing option was fundamentally the controlling factor. Failure to realize, when deciding the instant case, that notice is everything in cases of this type, is what led the Puerto Rican Supreme Court into the commission of an inescapable error in the present case (departing from its principles of its former decision in the ejectment or unlawful detainer *Lluberas* case), which does violence to fundamental principles requiring good faith in human private relations, and to the unanimous decisions of the Supreme Court of Spain, the Puerto Rico itself in its former decisions, the English courts and State and Federal courts.

Take, for example, the judgment of the Supreme Court of Spain of May 13, 1903, copied in Appendix II to our Supplemental Brief. The question involved was whether a lender, ''prestamista'', who loaned money guaranteed with a mortgage upon certain property, which appeared in the Registry as belonging to D. Luis Mercader but with knowledge from other sources that D. Luis had sold that property to Don Joaquin, who did not register the deed of purchase, was to be regarded as an innocent third party. The Court simply said ''no''; resting its decision on the effect of notice, and expressing itself as follows:

> ''Considering that the spirit and meaning of section 34 of the mortgage law is not so absolute, according to the repeated jurisprudence of this Supreme Court, as to recognize the status of a third party in him who makes a loan guaranteed with a mortgage upon an im-

movable with notice that the immovable was previously sold by the mortgagor even if this does not appear from the Registry, provided that that knowledge is revealed by acts of the purchaser or in facts whose significance could not be ignored and indicative of assent; because in that case is lacking foundation in law to give to the knowledge of the situation in the Registry any significance; for being one of the principal objects of the law, the publicity of charges, incumbrances and other liens affecting immovables so that nobody could be held responsible for those he ignores, it is unquestionable that according to that law we cannot regard as a third party him who, though having not entered in the act or contract, had knowledge of it, this doctrine being in agreement with principles of law, according to which nobody will be allowed to deny that which he has once accepted without protest or that was either expressly or impliedly consented to."

The above is only one case out of many. In not applying this principle to the instant case, lay the obvious underlying error of the insular Supreme Court in the present case. Respondents' brief falls into the same misconceptions.

Our Supplemental Brief cites the English case of *Le Neve* v. *Le Neve*, 1 Ves. Sr. 64, 66-67, 27 Eng. Rep. 893, a leading case recognizing the effect of actual knowledge of the true facts as supplying a defect in the records of them in Public Registry in every sense. That case states the doctrine in England in regard to cases involving facts and laws analogous to those now subject to discussion. In that case, as in cases in other jurisdictions, Spain included, the Court did not indulge in theoretical considerations other than the mere fact of actual notice. If there is notice, why play the game of the *mala fide* buyer, who is naturally interested in getting the mind of the Court away from the controlling factor of notice into discussions which are immaterial under the existing circumstances and according to applicable principles of public policy.

That is, if a person knows of the existence of a right, it is a matter of public interest that he should be held to

respect that right. It is even immaterial that he is in doubt as to whom the right belongs. Thus the Supreme Court of North Carolina said in *Maples* v. *Medlin*, 5 N. C. 219; 3 Am. Dec. 687, 690:

> "Ray, at the time of his purchase from Curry, was expressly told by the latter that he had sold the lands, and was a mere naked trustee; in truth, that he had nothing to sell or transfer but the mere legal title, which Ray, under this notice, obtained from him. Upon this statement, there can be no doubt but that Ray became a trustee for the complainant, and bound to convey to the *cestui que trust* in the same manner Curry would have been bound. But it is said that Ray had no notice of the particular *cestui que trust*, and that general notice is not sufficient. *We think it is not necessary that he should have notice of the particular* CESTUI QUE TRUST; *it is sufficient if he have notice that the person from whom he buys is but a mere trustee. For he is then informed that he can buy nothing; that the seller has nothing to part with, and that the moment he obtains the legal estate, he becomes a trustee for the* CESTUI QUE TRUST, *be he who he may.*" (*Italics supplied.*)

Respondents knew the option was Mercado's. They tried to beat the option. They did not try to comply with it for the benefit of anybody, either for the benefit of Mercado or of the Tous Soto widow and heirs. What equity do they have, then, to say that, even though they know of, and deliberately planned to beat, the option, they should not be sued to compel compliance with it by the party who, according to respondents' own knowledge, and the Tous Soto widow's and heirs' acceptance, is the real owner of the option. No distortion of contractual obligations can overcome these realities.

A person who contracts an obligation, if refusing to comply, will not be helped by the courts under more or less shallow pretenses to escape with the fruits of his mischief. *Gisselman* v. *Starr*, 106 California 653.

If the intention of the respondents had been to comply with their contractual obligation, and, if they honestly thought the option belonged to the heirs, why did they not comply with their obligation toward the heirs?

They, the heirs, then would have told them who was the real owner of the option. Respondents did not follow this course, naturally, because they knew that the option belonged to the agricultural partnership Mario Mercado e Hijos, and they were bent on usurping it. That is why, when the heirs knew of the infringement, they filed their disclaimer in the interest of justice and for the same reasons and principles recognized in *Gisselman* v. *Starr, supra,* and in an unbroken line of cases covering the same or similar facts.

Coming back to the question of notice, take the Puerto Rican cases cited in our Supplemental Brief. All of them were decided, as the ejectment case between the present parties (*Lluberas* v. *Mercado,* 55 P. R. Rep. 39, *supra*) was decided, upon the controlling question of notice, which prevents the *mala fide* purchaser from taking shelter in speculations upon the provisions of the Civil Code or of the Mortgage Law.

In *Colon* v. *Colon,* 51 D. P. Rep. 95, quoted in our Supplemental Brief, the Court rested its decision entirely upon the question of notice and the actual knowledge that Raul Colon had of the simulated character of the conveyance by his aunt to his father. It was that notice that was the *ratio decidendi* of the controversy. Colon looked for shelter behind theoretical considerations based upon Article 34 of the Mortgage Law. In our case, instead of discussing the effect of notice, the insular Court indulged in theoretical and immaterial observations in regard to provisions of the Code, which were put out of the picture by the overwhelming effect of actual notice.

In *Quintana* v. *Capital of Puerto Rico,* 51 P. R. R. 103, likewise quoted in our Supplemental Brief here, the buyer knew that the Municipality was in possession of the prop-

erty. Quintana had been a resident of San Juan since 1912. He knew that the lot had a school building standing on it for years; he was told that the land was not the property of the seller; yet Quintana wanted the case to turn upon general provisions of the Code and Mortgage Law and on other relatively theoretical considerations. The Court, however, turned him down squarely: Would not let bad faith succeed on such pretenses.

See *Smith* v. *Boughm*, 156 Cal. 359, 104 Doc. 680, and *Chapman* v. *Great Western Gypsum Co.*, 216 Cal. 420, 14 P. (2d) 758, that assignees or mortgagees with notice of option take subject to it. Let us cite another English case, cited in 50 A. L. R. 1321, where it is said:

> "In *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1901) 2 Ch. (Eng.) 37—C.A., it was held that, where a landowner stipulated that he would give the plaintiff the first refusal of his land, he was not free to dispose of the land to an independent purchaser, without informing the holder of the option of the proposed sale, and offering the land to him at such price as the intending purchaser was bona fide willing to give; and that upon failure to make such offer the holder of the option would be entitled to restrain the contemplated breach of the agreement."

And so it was said in another opinion of the Supreme Court of Puerto Rico, in *Pedro Maria Alvarez Lugo* v. *Municipality of Anasco*, 43 P. R. Rep. 498, 504-5:

> "In the first place, the district court concluded, in view of the evidence introduced by the defendant, that the plaintiff had knowledge of the existence of the servitude before he acquired the property, as it was shown that the plaintiff served for three years as alderman in the municipality, was a brother of the previous owner of the property, and maintained business relations with him, and had always resided in the municipal district of Anasco, and in such a case, *in accordance with the repeated jurisprudence of the Supreme Court of Spain and of this Supreme Court of Puerto Rico, the subsequent purchaser is not a third person.*" (*Italics supplied.*)

Although in the foregoing case the action was not brought against the municipality but against the vendor of the property, the principles which served to decide it are fully applicable to the instant case. *Confer*, also, *Roman Catholic Church* v. *Combate Tobacco Corp.*, 42 P. R. Rep. 363.

As regards the jurisprudence established by the Supreme Court of Spain, we will only transcribe one of the findings (*considerandos*) contained in the judgment of April 5, 1898, 84 J. C. 12. It says:

> "Considering that, according to the repeated jurisprudence of this Supreme Court, one has not the status of a third person, for the purposes provided in sections 2, 13, 23, and 27 of the Mortgage Law, invoked in the second ground of this appeal, who acquires property legally encumbered by a servitude the existence of which can not be doubted by reason of ostensible and indubitable signs thereof, even though such servitude be not recorded in the registry, as in such case, the encumbrance being manifest and not hidden, *there is a total lack of the reason on which such legal provisions are founded.*" (*Italics supplied.*)

In all these cases the acts of bad faith were not as strong and obvious as in ours; where respondents are charged with deliberate intent to evade the option. Moreover, see the findings of the Court here (Rec. 479-580) as to the successive execution of deeds by respondents among themselves. On February 25, 1937, Francisco Lluberas acted as mortgagee and Doña Elvira as mortgagor. In the deed of March 8, Lluberas acted as agent of Doña Elvira. In the deeds of March 9, Lluberas became the buyer of Indios and Doña Elvira the seller for the very same amount for which Doña Elvira presumptively mortgaged the estate to Lluberas just eleven days before. It must be kept in mind that Lluberas retained the money of the mortgage of February 25, which was really the sale price of the farm. With it he paid the notes March 8. The day after, March 9, 1937, the estate appeared sold to Lluberas himself for the very same sum of $40,000, for which

it was apparently mortgaged to the buyer only eleven days before. In his testimony, Lluberas admitted that he had been trying to buy "Indios" from Doña Elvira for two years (Rec. 110). Doña Elvira testified that she and the buyer reached an agreement and kept it in secret (See Doña Elvira's admissions to the effect that the sale was agreed to long before March 8, 1937, Rec. p. 381). It is apparent, therefore, that respondents incomprehensibly thought that they could beat petitioner out of the option by keeping the sale in secret and using the sale price for the payment of the notes.

But that method of violating the option was precisely what the terms of the option itself intended to prevent. Let us analyze it.

The option contract (Rec. 4-5) involved in this case may be divided into three parts:

1. The option itself:

> "Seventh: Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms."

2. *Modus operandi* of the option:

> "To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any *offer* of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else." (*Italics supplied.*)

3. Consequences of its violation:

> "Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such

sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

It is clear, therefore, from the terms of the option itself that the option contract contemplated the possibility of an attempted sale in the manner carried out by respondents; that is to say, by keeping the offer to buy in secret, selling the property and then, with the money of the sale (so kept in secret and retained by the *mala fide* purchaser), paying the mortgage notes. But it is also unquestionable that the option contract provided 30 days from the date of recording of the sale for the partnership to sue the *mala fide* purchaser for the reconveyance of the estate.

It is not alleged or challenged anywhere that the partnership failed to do all it was supposed to do under the terms of the option. The Court, as shown by the findings, found that the partnership complied in every sense.

Respondents, however stress the supposed failure of petitioner to record the reservation of the option. They disregard the effect of actual notice and fall into the same patent error that the Court below fell into when expressing itself thus (Rec. p. 487):

> "If the plaintiff when assigning its promissory notes to the heirs of Tous Soto had expressly reserved to itself the right of option and if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them. The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute. And we have already seen that according to the statute the assignment without reservation of the mortgage notes carried with that of the option. Therefore, if the defendants resolved to assume any risk towards the plaintiff when acting in the way they did, such risk entirely disappeared when the legal percept applicable thereto was established."

The error is self-evident now: As already stated, the Court finding and the facts of record clearly reveal actual notice, which is the best notice that can be given in the world. (See Olivieri testimony, R. 120-121; quoted below.)

Therefore, any discussion or talk about the Registry, which was created precisely to impart notice, is beside the point or immaterial.

We venture to transcribe a short portion of the testimony of the respondent, Francisco Lluberas Passarell, containing significant admissions on which the finding of the District Court quoted above (*ante*, p. 5) and in our original petition for certiorari (p. 10) was based, that all the respondents actually "were advised" (R. 39) "of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios'."

Mr. Lluberas Passarell said (R. 120-121):

"Q. I am going to put to you now the same question as in the ejectment proceedings of December 20, 1937, before Judge Todd, in the ejectment proceedings instituted by Messrs. Lluberas-Passarell against Mario Mercado e Hijos, and I am reading from the stenographic record in that case: 'Did you know whether Mario Mercado e Hijos held an option to purchase and lease?' Your answer: 'Yes, she had informed me.' Then, she told you, and you ratify such statement?

Mr. Lluberas: She had told me that she was indebted to Mario Mercado e Hijos, and then to Mrs. Belen de Tous-Soto.

Attorney Ochoteco: The question is in reference to Mario Mercado e Hijos, whether she told you that Mario Mercado e Hijos held an option to lease and purchase. This is the question I put to you now. A. That Mario Mercado e Hijos had assigned the same to Mrs. Belen Tous-Soto.

Q. Let us distinguish. One thing is your knowledge, your belief, and another is what Mrs. Elvira Olivieri told you concerning Mario Mercado e Hijos. *The only thing we are interested is whether you knew that Mario Mercado e Hijos held an option to purchase and lease, and whether said question was put to you in that case, and you answered: 'Yes, she had herself told me.' Did she tell you that? A. Yes, probably; of course.*

Q. Did you know that? A. I knew that she was indebted, and that such obligation included an undertaking.

Q. This question made to you just a short while ago, whether you knew it, is the same question I put you in the ejectment proceeding, to which I have been referring continuously, instituted before this court, presided by Judge Roberto H. Todd, Jr., *Hermano Lluberas-Passarell* v. *Mario Mercado e Hijos. My question was this: 'Do you know that?' Your answer was: 'Of course, I knew it.'* Do you ratify that statement?

Mr. Lluberas: If she stated that she was indebted, I knew it, of course.

Attorney Ochoteco: Does the witness remember whether on cross-examination in the ejectment proceedings before this court, presided by Judge Roberto H. Todd, *Lluberas-Passarell, plaintiffs,* v. *Mario Mercado e Hijos* (I am reading from the stenographic record), your attorney in that action, Lopez-de-Victoria, put to you the following question: 'Please tell me . . .' (I am reading from the examination of you by my colleague Lopez-de-Victoria) *'Please tell me, when Mrs. Elvira Olivieri talked with you concerning the estate, and she said that she did not sell because she had granted an option, did she tell you in whose favor was that option?' And you answered: 'In favor of Mario Mercado e Hijos.'* That was your answer. *My colleague said: 'Or of the widow of Tous-Soto?' The answer: "No." 'And in whose favor?' 'In favor of Mario Mercado e Hijos.' 'Not in favor of the widow of Tous-Soto?' 'Not in favor of the widow of Tous-Soto,' you answered.* In order to refresh your memory, please pay attention to what I say, because I am reading from the stenographic record. What I have just read. You can refresh your memory by examining the record.

[The witness examines a record presented to him by attorney Ochoteco.]

Attorney Ochoteco: Did you read again what I had already read to you from the stenographic record?

Mr. Lluberas: Yes, sir.

Q. Can you remember it now, that your memory is refreshed. A. *There is no doubt that I said so in the above case."*

In view of that testimony there can be no question of the meaning of the District Court's finding. Plainly it was not, as respondents now attempt to contend (*Brief*, p. 13) merely a finding that the respondent knew of the original option having been granted by the mortgage deed of March 23, 1932; *but it was a direct finding by the Court that all the respondents actually knew that the Mercado firm still held the option.*

If, however, we were to talk about the Registry, the Court below must be considered as in obvious error since the deed of August 20, 1936, which is the immediate source of Lluberas' title, told Lluberas, by force of law, three things, all leading to indisputable notice:

A. That the partnership, *not the widow and the heirs,* appeared as party to give consent to the partition deed. The heirs appeared nowhere in that deed, though executed over three years after the so much relied on assignment (Rec. p. 225).

B. That nothing was said therein about the assignment of the credits to the widow and heirs.

C. That in clause 18 (Rec. 255-256) it was stated as follows:

> "Eighteenth:—It is stated by the parties herein that the partnership Mario Mercado e Hijos appears in this deed through its attorney-in-fact, Jose R. Peralta, solely and exclusively for the purpose of the consent given by said partnership as interested in the mortgage *credits* above mentioned to the partition of the jointly owned properties carried out therein, but that it does not bind itself by, nor is it responsible for, the stipulations contained in the clauses of the present deed and that, as far as said partnership is concerned, any of said clauses affecting its rights as present lessees of the estates and adjoining property owners of the estate Los Indios shall be held as nonexistent." (*Italic supplied.*)

The deed of August 20, 1936, we repeat, was executed over three years after the assignment relied upon by re-

spondents. Can respondents now honestly say that they did not know what appears in that deed or that they were not bound to attach significance to its contents? In the deed of sale and lease of March 9, 1937, specific mention is made of the deed of August 20, 1936. That deed was recorded. It had to be, before Lluberas' deed could be recorded, though this is immaterial. Respondents, therefore, had, not only actual notice, which is more than sufficient, but also the best constructive notice that could be given of Mercado's claim.

That the Court in its findings refers to the option claim by *Mercado* as existing at the time of the cancellation of the notes, is obvious from the findings of the insular Supreme Court, in the former ejectment or unlawful detainer case, which are reproduced here for the sake of emphasis: *Lluberas* v. *Mercado*, 55 D. P. Rep. 39, 43:

> "We do not wish to reach any conclusion in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, *supra*, that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

In the present case, the same Supreme Court said, *Opinion below* (R. 481-482):

> "It also appears to have been shown that both Elvira Olivieri Commins and all the other defendants in cases Nos. 311 and 312 were advised, prior to the execution of the contract of sale and lease, of the right of option purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios."

We also repeat here for the sake of emphasis an extract from Lluberas and Doña Elvira's testimony. (Rec. 110; Rec. 381):

FRANCISCO LLUBERAS PASSARELL:

"Attorney Ochoteco: When did you show to Mrs. Elvira Olivieri Commins that you were interested in buying the 'Indios' estate?

A. I do not quite exactly remember, but it was long ago.

Q. As regards the date of the purchase, was it on March 9, 1937?

A. A couple of years, perhaps. One or two years; a couple of years at least.

Q. Prior to the signing of the deed of sale? Mr. Lluberas:

A. Yes, sir.

Attorney Ochoteco: When did you first speak to her about your being willing to buy that estate? A. Two years prior to the execution of the sale. At least, the time previously stated. I do not know how long it was, but it was long ago."

MRS. ELVIRA OLIVIERI COMMINS:

"Q. Tell me Doña Elvira, when you sold the estate 'Indios,' were not you demanded to lease the 'Juanita' estate to Millo?

"A. When Doña Elena offered me $40,000.00 for the 'Indios' estate she asked me to leave her the 'Juanita' estate, for the benefit of her daughters, all this as a special concession in the event that she should buy the property. I accepted because in my opinion it was good business, and as I was almost with the rope to my neck, I was broken, as I could not help it . . . I also had my attorney . . .

"Q. Who is your attorney? A. Sabater. Always when necessary he advises us.

"Q. Cannot you remember whether this contract of sale was executed a month prior to March 9, 1937? A. I don't remember whether it was a month or twenty days. . . . Well, I had already given my word. You know I am very honest and my word is always made good. In this I take after my father.

"Q. Then, when you sold the 'Indios' estate, was it on condition that you should lease the 'Juanita' estate, was it on condition that you should lease the 'Juanita' estate? A. Yes, sir. The 'Juanita' estate. I had already given my word."

It is also contrary to logic to make it appear as if the option contract and the negotiable notes contract were one and the same thing. They were simply different contract and though this is not material, please consider the following cases:

> "The Lease and Option to Purchase contained in one instrument constitute separate agreements." *Bennett* v. *Petroleum County*, 288 P. 1018; 87 Montana 436.
>
> "An option to purchase real estate is an unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such an agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the optionee shall have the right at his election or option, to demand the conveyance in the manner specified. It is merely the right to an election which has been sold, and the owner of this is not bound to complete the sale. *Morgan* v. *Forbes* (1920) 236 Mass. 480, 128 N. E. 792, citing among other cases *Barnes* v. *Rea* (1908) 219 Pa. 287, 68 Atl. 839.
>
> "An option is not a sale of land or an agreement to sell land, and therefore the consideration paid for an option is not consideration for the land. The consideration for the option is a thing apart from the consideration for the sale of the land. An option contract and a contract of sale are in fact two separate and distinct contracts, viz., an option contract and the agreement to sell. *C. C. Slaughter Cattle Co.* v. *Potter County* (1921; Tex. Civ. App.) 235 S. W. 295 (affirmed in (1923; Tex.) 254 S. W. 775)."

In our case, the consideration for the option contract was the acceptance of negotiable notes in payment of a debt due and collectible. The negotiable note contract rested on the consideration of the money loaned. This situation is obvious and any attempt to confuse it by specious argumentation can lead only into more difficulties for respondents.

VI.

There is no possible foundation for respondents' suggestion that Mrs. Tous Soto was guilty in some way of improperly withholding knowledge from her children in purchasing the "bearer" notes in May, 1933, of the reservation to the Mercado partnership of its rights in the option, or of the partnership right to continue to be the one to be asked for consent to any division of the estates between the sisters; or rather that those rights were simply not being purchased from the partnership.

The suggestion is as fantastic as is respondents' suggestion (*Brief*, p. 18) that our original Petition and Supporting Brief "misrepresented" the meaning of the Mercado firm, and not the Tous Soto heirs, having been the one whose "consent" was asked, and formally given, to the partition deed between the sisters, of August 20, 1936, to which reference is made above. (*Confer, ante* "6," "7," pp. 6-9.)

VII.

As above indicated, respondents' brief attempts no real reply whatever to what is said in our original Petition and Supporting Brief, and in our Supplemental Brief, as to the invalidity of Rule 39(b) of the First Circuit Court of Appeals, and as to that Court's misunderstanding of this Court's rule of the respect to be accorded to decisions of Territorial courts of last resort upon questions of local law; or as to the Circuit Court's plain misapplication of this Court's rule in that regard, in the present case.

VIII.

A. Respondents' brief talks about petitioner being a Wealthy land owning agricultural partnership in Puerto Rico holding, as they say, more than 500 acres of land for agricultural purposes, and that it has been sued by the

Attorney General of Puerto Rico[1] for continuing to hold its lands in excess of 500 acres in supposed violation of the Puerto Rico Land Law of 1941,—lands which it acquired long prior to the enactment of that Act by which the Legislature sought to extend to partnerships and unincorporated associations the prohibition against corporation holdings of more than 500 acres of agricultural lands in the Island. The Congressional prohibition was made forty-four years ago by a Joint Resolution of May 1, 1900 (J. R. No. 23, Sec. 3, 31 Stat. 715, 716); but extends to *corporations* only. Whether or not the Legislature of Puerto Rico possesses power to extend it to partnerships and other types of land ownership, and whether or not, in any event, this particular partnership may be said to be within the purview of the Legislature's Act of 1941 is immaterial here. That legislation was all long after these transactions, whic,h culminated in 1937. In any event, no one but the Attorney General of Puerto Rico could question the rights of this petitioner partnership to its land or contracts, including its right under this option contract of March 23, 1932.

B. Respondents say, and repeat (Brief, p. 11) that Mrs. Olivieri Commins was "forced" into the March 23, 1932, transaction with the Mercado partnership and the giving of the option to permit them to purchase the land, or to renew their leases, on the same terms anyone else might offer.

But there is not a word anywhere in the record to support that charge. To the exact contrary, this seven year loan of something more than $40,000, made to her by this agricultural firm, at the time of the depth of the financial depression, appears liberal. This Court may take judicial notice of that depression and that it was as acute in Puerto Rico as in the mainland. The Mercado

[1] Along with other sugar producing firms and partnerships. It is not one of those of the first magnitude in Puerto Rico.

firm were not bankers, but nevertheless they granted this seven year loan, to Mrs. Olivieri Commins at a usual going rate of interest in Puerto Rico, without requiring any annual reductions of the principal or any other conditions except only that if she should desire to sell the property, or to lease it again at the expiration of the ten year leases of it then held by the partnership, she would let the partnership have an opportunity to buy it, or to renew its leases, on the same terms anyone else might offer.

CONCLUSION.

The judgment of the Supreme Court of Puerto Rico affirming that the District Court of Ponce was clearly wrong, and should be reversed; and the action or judgment or order of the Circuit Court of Appeals for the First Circuit, dismissing, under its Rule 39(b), the appeal to it, and affirming the judgment of the insular Supreme Court *pro forma*, without full hearing and argument, was likewise erroneous and a deprivation of petitioner-appellant's constitutional rights to due process of law and to the equal protection of the laws, and should likewise be reversed, and this case remanded to the District Court with directions to vacate its former judgments and to enter judgment in favor of the plaintiff-petitioner, Mario Mercado e Hijos.

Respectfully submitted,

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APPENDIX

APPENDIX I.

(Testimony of E. Olivieri-Commins)

"Attorney Ochoteco: I beg the court to bear with me on account of the lengthy examination, but I am examining on the basis of a memorandum before me. When Mr. Chito Lluberas lent to you the $45.000, was it not on the condition that the lien on account of the principal be prorated between the two estates, that is, that the $45,000 be split, upon the two estates, as security, proportionately to the $45,000?

Mrs. Olivieri: I gave him the mortgage because he had given me the money.

Q. Did not he suggest to you to distribute the lien? A. No, I do not think so. I do not remember.

Q. When did yon do that? A. I mortgaged to him all my land for $45,000, and that is all I remember; that is all I understand.

Q. Tell me, madam. In the sale from you to Messrs. Lluberas of one of the estates on March 9, 1937, by deed number 40 executed before notary Luis Lopez-de-Victoria, it is stated that the consideration of the sale is $40,000. This amount is admitted by Mrs. Elvira Olivieri-Commins as having been received from the purchaser before this act to her entire satisfaction, and for which sum, etc. The $40,000 which you admit to have received as the purchase price of your estate, was it not part of the $45,000 lent to you by Mr. Lluberas on a mortgage?

Mrs. Olivieri: Yes, sir. It was part because the amount was 45—

Attorney Ochoteco: Exactly. In other words, out of the $45,000 of the mortgage of Mr. Lluberas, $40,000 were paid by you to him as the purchase price of these estate, there being $5,000 short to be paid to you? A. Yes, sir. And I mortgaged to him the estate 'Juanita'.

Q. Was it so? A. Yes, sir.

Q. Tell me, madam, why did you decide to cancel the mortgage of the widow of Tous-Soto in order to execute another one in favor of Messrs. Lluberas, instead of continuing that of Mrs. Tous-Soto, which had not become due? A. Because the mortgage interest to be paid to her was 9 per cent, whereas the mortgage to Lluberas was 8 per cent, and I had the advantage that it would have been easy for

me to pay him even at 7 per cent, because we were good friends."

"Attorney Ochoteco: Then the mortgage of the widow of Tous-Soto was bearing 9 percent and the mortgage to Lluberas was going to bear 8 percent?

Mrs. Olivieri: Yes, sir.

Q. Was it 1 percent the profit you were going to make? A. Yes, sir.

Q. Then, madam, in order to make up your mind to pay the mortgage to the widow of Tous-Soto and to borrow the money from Mr. Lluberas so as to profit by 1 per cent, you had figured and knew that you were going to be benefited by 1 percent? A. Yes, sir.

Q. Did you know that you had to pay her three installments of interest in advance by reason of the premature cancellation of the mortgage? A. I figured. I figured because 9 percent is not the same as 8 percent. I thought first: 'May be later on he will reduce the rate of interest to seven.'

Q. Did you take into account the cost to you of the cancellation of the mortgage to the widow of Tous-Soto, and the execution of the new mortgage, and record thereof in the Registry of Property?

Mrs. Olivieri: I did not give much thought to that.

Attorney Ochoteco: You stated that one further reason for substituting the mortgagee was that Mr. Lluberas was related to you?

A. He is not related to me, but a close friend of mine.

Q. Do you consider each other as related? A. Yes, sir. In great mutual regard.

Q. A friendship, of how many years? A. A great many years.

Q. More or less? A. I do not know. Think of it, before he was born.

Q. At least, a friendship of 50 or 60 years? A. Almost.

Q. Tell me, madam. For the purpose of that substitution, you were borrowing from Mr. Lluberas $45,000 on a six-month mortgage. Do you realize that you were going to cancel a mortgage that had not yet become due, and substitute for it one to Mr. Lluberas for six months? A. I borrowed that money for six months, it is true, but always in due hope that he would extend the time at a lesser rate of interest. And that is why I borrowed that money from him in order to pay the widow of Tous-Soto.

Attorney Ochoteco: We know already that, but how can you explain away the borrowing of that amount for six months ($45,000 for six months), after which period the mortgage credit would have become due, and then to find yourself after six months with a mortgage credit already due for $45,000?

Mrs. Olivieri: In the hope that subsequently he would reduce the rate of interest. I am sure he would have accommodated me.

Q. Madam, when you received the $40,000 from Mr. Lluberas by virtue of the sale made to him of one of your estates, there was the sum of $5,000 short, and that $5,000 according to you were lent by him on a mortgage on some other estate? A. Estate 'Juanita'.

Q. At the rate of per cent and for five years? A. Yes, sir.

Q. And why did not you, when you executed the mortgage for $45,000, make that mortgage for five years, instead of for six month, at 6 per cent, instead of at 8 per cent, and on the other hand, when the sum was $5,000, you made it for five years?

Mrs. Olivieri: Will you please explain. I do not quite follow you.

Attorney Ochoteco: Of the $45,000 from Mr. Lluberas, $40,000 were for the sale of the estate "Indios". Then the balance of $5,000, up to $45,000, is secured by you with a mortgage upon the estate 'Juanita', for five years, at the rate of 6 per cent annually. A. Yes, sir.

Q. Was it not so? A. Yes, sir.

Q. Now, the question is as follows: why, when a $5,000 mortgage is involved, did you execute such mortgage for five years at 6 per cent, and on the other hand when a $45,000 mortgage is involved you executed the mortgage for six months at 8 per cent? A. I will tell you. At the time of the execution of the mortgage for $45,000, I always hoped that he would reduce (the rate of interest), and always with the idea of borrowing such amount and pay, and this is proven by the fact that he was so liberal that he executed to me the 'Juanita' mortgage and brought down the interest to 6 per cent.

Q. The five-year mortgage?

Mrs. Olivieri: Yes, sir, and if I had asked him 20, he would have allowed me 20.

Attorney Ochoteco: But you did not ask him a 2-year mortgage when you borrowed from him the $45,000?

A. At that time—"

APPENDIX II.

Testimony of M. Francisco Lluberas—Extract.

"Attorney Ochoteco: Why is it that if what you were doing was an investment, a loan transaction whereby you were lending $45,000 to Mrs. Elvira Olivieri-Commins; why did you, when prorating the lien to be borne by the estates burdened by the debt, burdened the estate 'Indios' with $40,000, and the 'Juanita' estate with $5,000 only, if the 'Indios' estate was worth $40,000, and the 'Juanita' estate more than $25,000?

Mr. Lluberas: I understood that both estates were going to be given as security for the indebtedness, the payment of my loan; and the attorney who made the prorating had my full confidence and he did it that way; perhaps because it was more convenient for the notary, or the registry or for any other reason.

Q. Tell me, please, is there any other explanation that the witness might furnish, which is not that? Any further explanation other than that? A. I think this is the only explanation that fits the case.

Q. You, and I have in mind the date when you effected that purchase, on or about the 9th of March, 1938, and at the time of the trial of the ejectment suit, of which we know; the date about the 20th of December, 1937; about March 9, 1937, had you ever executed any mortgage in your life?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: And were you at that time as solvent as you are at present? A. I think so.

Q. And did you know at that time the meaning of a loan secured by mortgage? A. Of course.

Q. Because you had already made other deals regarding mortgages? A. Yes, sir.

Q. What was your age, or how old were you in 1937? Pardon my insistence as to the age. A. I was two years younger than now; a little less than 38.

Q. Between 37 and 38, more or less? A. Yes, sir.

Q. About 1937, had you been for several years in important business? A. Yes, sir.

Judge: Less than 38 years old means that you were then between 37 and 38?

Mr. Lluberas: Near 38.

"Attorney Ochoteco: Please tell me: as you were, in or about March, 1937, a business man, an age of discretion, who had lent out money on mortgages, and a considerable sum being involved, $45,000 for instance, you did not see to it that the $45,000 were evenly distributed between those two estates, considering the liability of each estate, so that the two estates should answer for the $45,000 proportionately to their value? A. The estates covered the amount of the indebtedness; the payment of the debt.

Q. Was one answerable for $5,000 and the other for $40,000? A. Yes, sir.

Q. Why did not you see to it that they were answerable, that they were proportionately balanced, if you were a business man, proportionately to the value of each of these two estates, but instead you made one of the estates answer for $40,000 and the other estate, which according to you is worth $25,000, answer for $5,000 only? A. That did not matter.

Q. Why did not it matter? Did not you want to secure your money?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: At the maximum, on a 100 per cent security? A. I considered it well secured at a 100 per cent, as we did."

Q. You had testified that the 'Indios' estate, bought afterwards by you and your sister, was worth $40,000? A. Yes, sir.

Q. If the estate was worth $40,000 and you made it to answer for a sum equal to its value, and allow the 'Juanita' estate to answer for $5,000; was not it better to prorate such amount between the two, if one is worth $40,000 and the other is worth $25,000? Then, proportionately, let us put it, for example, that one estate should answer for $25,000 and the other for $20,000, or one for $15,000 and the other for $30,000? A. Because by the way it was done, I considered the investment to be secured.

Q. Then, you bought that estate which secured $40,000, precisely for that $40,000? A. Yes, sir.

Q. And you, in order to invest $45,000, which is a very respectable amount—at least to me—was it so to you?

Mr. Lluberas: Also, very respectable.

Attorney Ochoteco: To me that amount of $45,000 is a very respectable sum. Did you not, before investing such amount, go and see those estates, in order to ascertain their

value? A. The estates were mortgaged for $41,000, and I deemed it unnecessary to go and look at the 'Juanita' estate, in view of the fact that I knew what the two estates were worth, and what another investor would have advanced for the two estates.

Q. If I understood correctly—please correct me if I am mistaken—did you rely on the judgment of former mortgagees? A. Yes, sir.

Q. Did not you go and look at the 'Juanita' estate? A. No, sir.

Q. Tell me, Mr. Lluberas, as you relied on the financial view point of former mortgagees as to the value of the 'Juanita' estate and as to the value of the 'Indios' estate, did you rely on that financial viewpoint as to the prorating of the mortgage liability? Did you prorate it in the same way as the former mortgagee; did you follow such viewpoint?

Mr. Lluberas: I have stated before that the attorney made the prorating of the valuation of the two estates.

Attorney Ochoteco: For the purpose of properly explaining my weighing of your testimony—and if my interpretation is wrong, please correct me. And you, who were going to invest $45,000 on two rural estates, who relied as to the final security on the judgment of a former mortgagee—please correct me if I am mistaken—was this so? A. Yes, sir.

Q. Do you state to me that as regards the prorating of the liability between the two estates, you allowed yourself solely and exclusively to be guided by the honest judgment of your attorney? A. Exactly.

Q. Of attorney Luis Lopez-de-Victoria? A. Exactly.

Q. And you, who were going to part with $45,000, a respectable sum according to you, you delegated to the notary the responsibility of prorating such amount, having followed the judgment, as to the investment, of the former mortgagee, for the prorating of the security? A. I accepted the prorating made by the attorney.

Attorney Ochoteco: And why did not you take the trouble; did not make the effort, did not act on your own initiative, as a man of business, as you have stated, the business of lending money on mortgage, did not make the prorating yourself, and you told the notary to make such prorating himself?

Mr. Lluberas: Because the 'Indios' estate adjoins our property, and by appraising the other at $5,000 I considered that the money was well secured, without the necessity of entering into further details.

Q. Did you know that that estate was worth $40,000? A. Yes, sir, and some more.

Q. Was it worth more than $40,000? A. At that time, and subsequently I would have rejected an offer of $60,000.

Q. Irrespective of such considerations, which have no bearing on the suit. A. The value of the estate is relative.

Q. You have testified that this estate (and I am now confining myself to your previous testimony), that that estate was worth $40,000; did not you call the notary's attention when you saw that he had set down $40,000 as the value of one estate and $5,000 as the value of the other? When making the deed, did you read the mortgage deed before affixing your signature to it?

M. Lluberas: Of course.

Attorney Ochoteco: Did not you call the notary's attention to it? A. I did not.

Q. Did not you ask him the reason why he made such prorating? A. It was immaterial. Such prorating in this case was immaterial."